

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CMG MORTGAGE SERVICES, INC.,

Plaintiff,

v.

WYMAC CAPITAL, INC.,

Defendant

No. C-06-3750 MMC

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS OR, IN THE
ALTERNATIVE, TO STAY; VACATING
HEARING**

Before the Court is defendant Wymac Capital, Inc.'s motion to dismiss, filed July 3, 2006, to dismiss plaintiff CMG Mortgage Services, Inc.'s complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, to stay the instant action in light of an earlier-filed action pending in state court. Plaintiff has filed opposition, to which defendant has replied. Having reviewed the papers filed in support of and in opposition to the motion, the Court deems the matter suitable for decision on the papers, VACATES the hearing scheduled for August 11, 2006, and rules as follows.

1. Contrary to defendant's argument, plaintiff has adequately alleged standing to assert its claim for unfair competition in violation of the Lanham Act, as well as its derivative claim for declaratory relief. Specifically, plaintiff's allegations that it is a competitor of defendant, (see Compl. ¶ 5), that defendant has made false and misleading statements about defendant's products in its advertising, (see, e.g., Compl. ¶¶ 23, 31, 33, 34), and that

1 plaintiff has lost customers as a result thereof, (see Compl. ¶ 37), are sufficient. See Waits
2 v. Frito-Lay, Inc., 978 F. 2d 1093, 1109 (9th Cir. 1982) (holding plaintiff who alleges injury
3 by reason of competitor's false representations in advertisements has standing to bring
4 claim for unfair competition under Lanham Act).

5 2. Although defendant argues plaintiff lacks standing to bring a claim under the Real
6 Estate Settlement Procedures Act ("RESPA") and, alternatively, has failed to state a claim
7 under RESPA, such arguments are unavailing because plaintiff has neither alleged nor
8 attempted to allege a claim under RESPA. Although the complaint alleges defendant has
9 "falsely advertis[ed]" that it offers services in compliance with RESPA, (see Compl.
10 ¶ 23), a false advertising claim based on a defendant's having falsely stated it is in
11 compliance with a federal law is not transformed into a claim for relief under the federal law
12 referenced in the defendant's advertisements. See, e.g., Alparma, Inc. v. Pennfield Oil
13 Co., 411 F. 3d 934, 939-41 (8th Cir. 2005) (holding plaintiff stated claim for false advertising
14 based on allegation defendant falsely represented its product was approved by FDA;
15 rejecting defendant's argument plaintiff's claim was "impermissible private attempt" to state
16 claim under FDA regulations).


17 3. Defendant is not entitled, under the Colorado River doctrine, to a stay of the
18 instant action in light of the state court action between the parties herein. Although
19 defendant asserts some of the issues presented herein, perhaps even the majority of such
20 issues, will be resolved in the state court proceeding, defendant has not shown that "the
21 pending state court proceeding [will] resolve all issues in the federal suit." See Holder v.
22 Holder, 305 F. 3d 854, 868-69 (9th Cir. 2002) (holding defendant not entitled under
23 Colorado River doctrine to stay of federal proceeding in favor of state proceeding, where
24 defendant showed some but not all issues presented in federal action would be resolved in
25 state action). One issue presented herein that defendant has not argued, let alone shown,
26 will be resolved in the state court proceeding is whether defendant, in its advertising, has
27 used the symbol TM in connection with words and phrases for which it has not obtained
28 trademark protection. (See Compl. ¶ 33.)

CONCLUSION

For the reasons stated, defendant's motion to dismiss or, in the alternative, to stay is hereby DENIED.

IT IS SO ORDERED.

Dated: August 3, 2006


MAXINE M. CHESNEY
United States District Judge